Supreme Court, U.S.
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No. 03-1539 MAY 11 2004

OFFICE

In The

Supreme Court of the United States

ROBERT RICHARD KING,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Where a government operative secretly records conversations with the defendant, during which he makes incriminating statements and attempts to elicit incriminating statements from the defendant, all with the intention of playing those recordings as substantive evidence at trial, are such statements "testimonial" so as to fall within the Confrontation Clause restrictions of *Crawford v. Washington*, 124 S. Ct. 1354 (2004)?

2. Can the government obtain a conviction for bribery of a foreign official under the Foreign Corrupt Practices Act without any showing that any money was paid, attempted to be paid, or even allocated for payment, and without identification of the public official who is the recipient of the proposed bribe or the "official act" for which the payment was to be given?

3. Is it outrageous government conduct that violates due process for the government to obtain a conviction of a defendant by planting a wire on a confessed felon, allowing him to manufacture a "crime," and instructing him to make incriminating statements in order to elicit concurrence from the defendant?

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PETITION FOR WRIT OF CERTIORARI

Petitioner Robert Richard ("Rick") King respectfully requests that the Court grant a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 351 F.3d 859 (8th Cir. 2003), and is reproduced in Appendix A (A-1). The order of the Court of Appeals denying rehearing and rehearing en banc is reproduced in Appendix B (A-16).

JURISDICTION

The opinion and judgment of the Court of Appeals were filed on December 15, 2003. Petitioner's timely petition for rehearing and rehearing en banc were denied on February 19, 2004. This petition was filed within 90 days of February 19, 2004. Jurisdiction of this Court is founded on 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

Amendment VI to the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . . "

Title 15 U.S.C. § 78dd-2, the Foreign Corrupt Practices Act, provides:

"(a) It shall be unlawful for any domestic concern . . . to make use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to –

"(1) any foreign official for purposes of –

"(A)(i) influencing any act or decision of such foreign official in his official capacity. . . .

"(h)(1) The term 'domestic concern' means –

"(A) Any individual who is a citizen, national, or resident of the United States. . . . "

STATEMENT OF THE CASE

Petitioner Robert Richard King originally loaned $2 million to a company owned by one Stephen Kingsley, supposedly to be spent for a port development in Costa Rica. Kingsley squandered the funds on his own hedonistic lifestyle, precipitating an FBI investigation. Kingsley eventually confessed to a series of felonies and then persuaded the agent in charge, Robert Herndon, that petitioner was part of a plot to bribe Costa Rican officials to obtain "concessions" regarding the port project (Tr. 579).

Even though Herndon knew that petitioner was a victim of Kingsley's swindle (and had so advised petitioner), he commissioned Kingsley to record conversations

with petitioner to establish the bribery conspiracy (Tr. 580, 726, 821). Accordingly, over a three-month period, Kingsley recorded some 29 conversations with petitioner, almost all of which were initiated by Kingsley (Tr. 709). Petitioner, who knew he had been fleeced by Kingsley, had no intention of engaging in any transaction with him, but was biding his time while attempting to put together a viable group to salvage the Costa Rican project (Tr. 788-89).

Although there had been earlier discussions about making a contribution to one or more of Costa Rica's political parties (Tr. 696-97), once Kingsley went to work for the government, he consistently characterized the potential payment on tape as a "bribe" and sought petitioner's concurrence in that terminology (Tr. 710, 821). When Kingsley told him (falsely) on tape that bribes had previously been paid, petitioner expressed shock and disbelief (JA Ex. 2, pp. 7-8). While on a few occasions petitioner did not challenge Kingsley's nomenclature, at one point he said emphatically "I didn't talk to anybody [about] bribe payments," and "I've never said I'm bribing anybody" (JA Ex. 70, pp. 66-67). He also announced that he wanted to get lawyers involved to make sure that everything was done the right way (Tr. 696-99, 718-20). And he insisted that no action would be taken until he went to Costa Rica and evaluated the situation for himself (JA Ex. 3, pp. 15-18).

Based on the tape recordings, petitioner was indicted for violating the Foreign Corrupt Practices Act, 15 U.S.C. § 78dd-2(a)(1)(A) ("FCPA"), together with a Costa Rican national named Pablo Barquero. By the time of trial, Kingsley was dead. Barquero was likewise unavailable. Over petitioner's Confrontation Clause objections, the

government played excerpts from seven of the recordings of Kingsley's conversations with petitioner, and four tapes of Kingsley's discussions with Barquero. The trial court ruled that these recordings were admissible under the co-conspirator exception to the hearsay rule.

It was undisputed at trial that no payment was ever made or offered to any Costa Rican official. Petitioner never raised any funds for the Costa Rican project, and no one ever appropriated, segregated, or allocated any moneys for the alleged payment. The only overt act relied on by the government to support the bribery charge was petitioner's (unsuccessful) solicitation of financial support for the port project from potential investors.

No particular Costa Rican official was ever identified as the proposed recipient of the would-be payment. The evidence showed only discussion about a laundry list of political figures who were never shown even to have heard of Kingsley, let alone of petitioner. And the object of the proposed payment was described on the tapes only as the obtaining of some amorphous "concessions" on the land to be developed.

The jury found petitioner guilty of FCPA conspiracy and of four substantive violations based on his fund-raising efforts. He was sentenced to 30 months in prison and fined $60,000. On December 15, 2003, the Eighth Circuit affirmed, holding that "[t]he tape recordings alone, support the jury's verdict" (A-5). The court rejected petitioner's Confrontation Clause argument, citing *Bourjaily v. United States*, 483 U.S. 171 (1987), as dispensing with any inquiry into reliability for co-conspirator statements. The court did not address petitioner's argument that the alleged recipient of the payment had never been identified,

but set forth at length excerpts from the tape recordings referring generically to "politicians" (A-5-7 n. 2). Petitioner's claim of outrageous government misconduct was also rejected, the court noting that "Kingsley's character was flawed" but that "the use of unsavory informants is quite often the nature of the beast in police investigations" (A-15). Rehearing and rehearing en banc were denied (A-16).

REASONS FOR GRANTING THE PETITION

I. Co-Conspirator Statements Uttered for the Purpose of Creating Evidence Are Testimonial and Subject to the Confrontation Clause Under *Crawford v. Washington*.

Much of the evidence against petitioner in this case was presented in recordings of conversations between petitioner and Kingsley, the confessed felon who by then was working with the government to concoct a case against petitioner, and between Kingsley and Barquero. It is perfectly clear that the subject matter of the taped conversations was dictated by the FBI and that the purpose of the recordings was to create "evidence" that could be played at trial (Tr. 578-84). FBI agent Herndon admitted that he "specifically gave Kingsley instructions to bring up the kickback so that [he could] see what people say" (Tr. 821).[1] Portions of those recorded conversations

[1] Herndon further testified as follows:

"Q. And did I hear you say that in the course of dealing with Kingsley, and particularly for the August 17 meeting, sometimes you wrote out instructions for how Kingsley was to operate?

(Continued on following page)

were played verbatim for the jury and were the cornerstone of the government's case.

By the time of trial, though, Kingsley was dead. Petitioner's counsel thus had no chance to cross-examine him about the fabricated "conspiracy," his defrauding of petitioner, his instructions to entrap petitioner, his criminal record, or any other subject that would have substantially undercut the authenticity and probity of the recordings. Barquero was likewise unavailable, being safely ensconced in Costa Rica, but petitioner's objections to the playing of the tapes on the basis of the Confrontation Clause were overruled.

Earlier in this Term, and subsequent to the opinion of the Court of Appeals affirming petitioner's conviction, this Court reinforced the Confrontation Clause of the Sixth Amendment in *Crawford v. Washington*, 124 S. Ct. 1354 (2004). The Court discarded the "indicia of reliability" test of *Ohio v. Roberts*, 448 U.S. 56 (1980), and held that testimonial out-of-court statements of an unavailable witness cannot be introduced against a criminal defendant unless there was a prior opportunity for cross-examination. The Court left "for another day any effort to spell out a comprehensive definition of 'testimonial,'" while noting by way of example in *dicta* that the rules of

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"A. Correct.

"Q. And there is a script or set of instructions that you gave in writing to Kingsley for this August 17 meeting, correct?

"A. That's correct.

"Q. And am I right that you told Kingsley specifically that he should use this script during meetings?

"A. Yes" (Tr. 817).

evidence do not consider statements in furtherance of a conspiracy to fall in that category. *Id.* at 1374, 1387.[2] At the same time, in language that accurately describes the present case, the Court recognized that "[i]nvolvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse. . . . " *Id.* at 1367 n. 7.

This is that "other day" anticipated by *Crawford*, and this case affords the Court the opportunity to analyze the "testimonial" requirement in a context that recurs with great frequency – *i.e.*, where a government mole lures the defendant into an illegal plot and records the discussions for the purpose of creating trial evidence that will be heard through the jury's headphones. Even if this does not violate due process (*see* Point III, *post*), it is surely *not* the type of out-of-court statement characterized as "non-testimonial" in *Crawford* and bears none of the indicia of reliability referred to in the Chief Justice's concurring opinion.

The contrived statements of Kingsley were used here to convince the jury that he and petitioner had agreed to bribe some Costa Rican officials. Petitioner's inability to cross-examine Kingsley or Barquero to expose the trumped-up nature of the relationship allowed Kingsley's statements to be heard by the jury without challenge and

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[2] The concurring opinion of the Chief Justice observed that co-conspirator statements are typically deemed reliable "due to the circumstances under which they were made," and that because "the declarant and the accused are partners in an illegal enterprise, the statements are unlikely to be false . . . ." *Id.* at 1377 (Rehnquist, C.J., concurring).

constituted a classic Confrontation Clause violation. The Court of Appeals rejected petitioner's Confrontation Clause argument on two bases. First, it ruled that the Confrontation Clause was not even implicated because Kingsley's statements were not hearsay but were merely offered to show the "completeness and intelligibility" of petitioner's adoption of those statements and because "such admissions [are] non-hearsay under the hearsay rule" (A-8-9).[3] Second, the court held Kingsley's statements admissible under the co-conspirator exception to the hearsay rule, citing *Bourjaily v. United States*, 483 U.S. 171 (1987) (A-9).

Neither of the Eighth Circuit's stated reasons for allowing the jury to hear Kingsley's recorded statements can survive *Crawford*. The test is not whether the statements were hearsay or non-hearsay. As the Court said in *Crawford*, "Leaving the regulation of out-of-court statements to the law of evidence would render the Confrontation Clause powerless to prevent even the most flagrant inquisitorial practices." 124 S. Ct. at 1364. Rather, under *Crawford*, the only inquiry is whether the statements were "testimonial" in nature. The Court of Appeals, without the benefit of *Crawford*, perfunctorily dismissed petitioner's Confrontation Clause argument by citing *Bourjaily* for the proposition that all co-conspirator statements are beyond the reach of that constitutional protection because they are conclusively presumed to be reliable. Indeed, *Bourjaily* invoked *Roberts* to dispense with a reliability inquiry on

[3] This reasoning is, of course, totally inapplicable to the taped recordings of conversations between Kingsley and Barquero, to which petitioner was not a party.

the basis that the co-conspirator exception to the hearsay rule is firmly rooted in our jurisprudence. *Id.* at 183.

But *Bourjaily* and other co-conspirator cases dealt with statements made under non-testimonial circumstances – that is, when they were unrelated to a criminal investigation and were made without litigation in mind. *See also, e.g., United States v. Inadi*, 475 U.S. 387 (1986). The basis for admission of such statements is that they "are given under circumstances that eliminate the possibility of fabrication, coaching, or confabulation and that therefore the circumstances surrounding the making of the statement provide sufficient assurance that the statement is trustworthy and that cross-examination would be superfluous." *Idaho v. Wright*, 497 U.S. 805, 820 (1990).

The statements in this case are different in kind. Whether hearsay or not, they are the antithesis of the type of co-conspirator statements discussed in this Court's previous cases. Kingsley had assumed the role of "witness" against petitioner, and cross-examination would easily have shown that his statements were neither genuine nor trustworthy. Ironically, the Eighth Circuit's approval of Kingsley's statements on the grounds that they were made merely to obtain petitioner's "adoptive admissions" betrays the facts (a) that they were specifically scripted with litigation in mind; and (b) that they were thoroughly unreliable. Kingsley's recorded seduction of petitioner is more akin to the confession of an unavailable accomplice that implicates another party, which is inadmissible under the Confrontation Clause. *Lilly v. Virginia*, 527 U.S. 116, 125-39 (1999) (plurality opinion). *Crawford* and the overruling of *Roberts* has called into question the vitality and reach of *Bourjaily* in the context of such evidentiary

co-conspirator statements. This Court should grant certiorari to determine the applicability of *Crawford* to co-conspirator statements uttered for the purpose of creating evidence, and to analyze the effect of *Crawford* on the holding in *Bourjaily*.[4]

II. The Decision Below Conflicts with Decisions of this Court and of Various Courts of Appeals Concerning the Elements Necessary for Proof of Bribery.

It is undisputed that no money was either paid or offered to any Costa Rican official. Nor were any funds appropriated or segregated for such a purpose (Tr. 622, 734-36). Viewing the evidence most favorably to the government, the so-called co-conspirators talked about making a contribution to one or more political parties in Costa Rica, which suddenly began to be characterized as a "bribe" by Kingsley after he began working for the government. Although petitioner expressly said on tape that he had no intention of bribing anyone and wanted to get lawyers involved to do the deal the right way (Tr. 718-20), on several other occasions he acquiesced in Kingsley's characterization of the proposed payment.

It is also clear that no particular Costa Rican official was ever identified as the recipient of the proposed "bribe." Likewise, the "official" act for which the payment was to

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[4] At a minimum, the Court should grant this petition, vacate the judgment below, and remand the case to the Eighth Circuit for reconsideration in light of *Crawford*, which was handed down after the decision below.

be made was never specified except in the most general terms, when it was called a "concession." The government made no showing that such a payment would be illegal.

Thus, the issue presented here is whether a defendant can be convicted of violating the Foreign Corrupt Practices Act by talking about bribing an unidentified foreign government employee for the purpose of obtaining some unspecified favorable action which may or may not be illegal. By rejecting petitioner's motion for judgment of acquittal, the district court allowed the jury to return a verdict of conviction in a case where the evidence, viewed most favorably to the government, showed conclusively that no crime had been committed. By affirming, the Eighth Circuit created a conflict with the decisions of this Court and numerous circuits regarding the elements of bribery that need to be proven to sustain a federal conviction. This case comes perilously close to criminalizing pure speech.

The relevant provision of the FCPA makes it illegal to take any act in furtherance of "an offer, payment, [or] promise to give anything of value to . . . any foreign official for purposes of . . . influencing any act or decision of such foreign official in his official capacity. . . . " 15 U.S.C. § 78 dd-2(a)(1)(A).

The question presented here is what the statute means when it prohibits giving anything of value to a public official to influence an official act. These terms have a well-defined meaning in the domestic bribery statute, 18 U.S.C. § 201, which is almost a precise analogue. Section 201(c)(1)(A) prohibits giving "anything of value" to a public official "for or because of any official act performed or to be

performed by such public official." Hence, in every pertinent aspect, the domestic and foreign bribery proscriptions are identical and are subject to the same sentencing guideline, § 2C1.1. The decision below, however, conflicts with numerous rulings from this Court and the various circuits regarding the "who," "what," and "how" of a bribery case:

1. In *United States v. Sun-Diamond Growers of California*, 526 U.S. 398 (1999), this Court held that the government must prove a link between the thing of value conferred on the federal official for a bribery conviction under § 201(b)(1), and that § 201(c)(1)(A) – the so-called "gratuity statute" – likewise requires proof of a connection between the payment and the *specific* act requested. Here, no specific act to be requested was ever identified at trial.

2. The failure to prove that the person to be paid is a "public figure" vitiates a bribery conviction. *United States v. Loschiavo*, 531 F.2d 659 (2d Cir. 1976). The government must show that the proposed recipient is acting in an official function, *Krichman v. United States*, 256 U.S. 363 (1921), and the proper inquiry is whether the person to be bribed occupies a position of public trust with official responsibilities. *Dixson v. United States*, 465 U.S. 482 (1984). The government specifically took the position below that "neither the statute nor any of the FCPA cases cited by the defendant address or support his claim that the official must be identified." (Br. for Appellee, 8th Cir. No. 03-1112, p. 18). A concomitant of the government's failure to identify the intended recipient was its failure to establish that a payment to him or her would have been illegal.

3. Mere acts of preparation to establish the willingness to engage in a bribery transaction do not constitute a crime. *United States v. Shulman*, 624 F.2d 384 (2d Cir. 1980). In order to aid and abet a bribery offense under § 201, the defendant must do more than associate with individuals involved in a criminal venture. *United States v. Dixon*, 658 F.2d 181 (3d Cir. 1981). The government must prove an actual giving of money or an offer to give or transfer money. *United States v. Rasco*, 853 F.2d 501 (7th Cir. 1988); *United States v. Hernandez*, 731 F.2d 1147 (5th Cir. 1984). Admittedly, no such offer or payment was made in this case.

In *United States v. Choy*, 309 F.2d 602, 606 (9th Cir. 2002), the Court of Appeals reversed a bribery conviction, finding that the acts on which the verdicts stood were too attenuated to bring the defendant's conduct within the proscription of the federal bribery statute. The government argued that the defendant's purchase of computers to be used and owned by an FDA official (turned government informant) as part of the official's efforts corruptly to clear the defendant's food imports was enough to convey indirect benefits to the official in violation of law. The Ninth Circuit disagreed:

> "There is no end to the chain of reasoning underlying the government's theory: payment of virtually any expense in preparation for offering a bribe would become a consummated crime of bribery. We cannot interpret the bribery statute so loosely." *Id.* at 606.

The Eighth Circuit here disregarded the teachings of all these cases and affirmed a bribery conviction under the FCPA – both for conspiracy and substantively – without proof of any payment or offer of payment, the identity of a

proposed payee, or the illicit objective sought to be achieved. As so construed, an FCPA case is infinitely easier to prove than a domestic bribery case, even though they are both based on the same public policy, contain the same elements, and carry the same penalties. This Court should grant review to underscore the fact that the standards are the same for proof of both types of bribery, to reinforce the elements of the crime of bribery, to determine what acts "in furtherance" of proposed payment are sufficient to trigger liability, and to ensure that citizens are not imprisoned for mere talk.

III. Outrageous Governmental Misconduct Bars This Prosecution.

One of the reasons the government was unable to prove the identity of the potential "bribee" or the type of "concessions" to be sought was that they didn't exist. The Costa Rican project as conceived by Kingsley was dead in the water as a result of his misappropriation of the funds contributed and his confession to the FBI. Hence, there was no viable project, no official to bribe, and no concessions to be requested. They were merely concocted by the confessed con-man Kingsley under the sponsorship and with the blessing of FBI Agent Herndon in an effort to ensnare petitioner, who had never before been in trouble with the law in his 70 years.

Petitioner had been identified by the FBI as the principal victim of Kingsley's fraud, and was so notified (Tr. 560-61). When Kingsley went down, he decided to take others with him and persuaded (*i.e.*, conned) FBI Agent Herndon to set up a sting on petitioner (Tr. 727-29, 742-54). Thereafter Herndon and Kingsley met every other day

while Kingsley engaged in a series of tape-recorded conversations scripted by Herndon with the specific purpose of manufacturing a non-existent crime and enticing petitioner to say incriminating things (Tr. 767-68, 801). The government even paid Kingsley's phone bill so he could continue making recordings (Tr. 769-70). Something is seriously – and constitutionally – wrong with this picture.

This Court has admonished that the judiciary should not tolerate overreaching conduct by law enforcement that is designed to instigate a criminal act by persons "otherwise innocent in order to lure them to its commission and then punish them." *United States v. Russell*, 411 U.S. 423, 428-29 (1973), quoting *Sorrells v. United States*, 287 U.S. 435, 448 (1932). In *Russell*, the Court said that "we may someday be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction." 411 U.S. at 431-32. In the Court of Appeals, the government denigrated this warning as *dicta*, and argued that it has been "criticized, limited, or even rejected altogether. . . . " (Br. for Appellee, p. 39). In seeking total insulation from judicial scrutiny of prosecutorial tactics, the government urged the Eighth Circuit to follow opinions from other circuits holding that the *Russell* doctrine is "moribund," and that the "banner of outrageous misconduct is often raised but seldom saluted." *Id.*, citing *United States v. Miller*, 891 F.2d 1265, 1271-73 (7th Cir. 1989), and *United States v. Santana*, 6 F.3d 1, 4 (1st Cir. 1993).

The Court should use this case to show prosecutors that there is indeed meat on the *Russell* bones and to disabuse them of their claim to unfettered discretion. Where, as here, the government deliberately targets and

induces an otherwise innocent person to engage in criminal-like conduct, the government's actions must be deemed sufficiently outrageous to warrant dismissal of the indictment as violative of due process. *See Hampton v. United States*, 425 U.S. 484, 489 (1976); *Russell*, 411 U.S. at 431-32.

In *United States v. Twigg*, 588 F.2d 373 (3d Cir. 1978), a government agent planned and controlled a drug laboratory and induced and directed the defendant to arrange some capital for the laboratory and to arrange some distribution of the drugs. In words that accurately describe the present case, the court found that the government agents had:

> "generated new crimes by the defendant merely for the sake of pressing criminal charges against him when, as far as the record reveals, he was lawfully and peacefully minding his own affairs. Fundamental fairness does not permit us to countenance such actions by law enforcement officials and prosecution for a crime so fomented by them will be barred." *Id.* at 381.

The Third Circuit held that the government's involvement in the crime was "so overreaching as to bar prosecution of the defendants as a matter of due process of law." *Id.* at 377. In *United States v. Batres-Santolino*, 521 F.Supp. 744, 751 (N.D. Cal. 1981), the court ruled the government's conduct to be outrageous because the defendants were lured away from law-abiding activities into a cocaine transaction. *See also Jacobson v. United States*, 503 U.S. 540, 548 (1992) ("In their zeal to enforce the law, however, Government agents may not originate a criminal design, implant in an innocent person's mind the disposition to commit a criminal act and then induce commission of the

crime so that the Government may prosecute."). The result below is inconsistent with these precedents.

This is not a case where an indicted individual made a deal with the prosecution to cooperate in helping catch bigger fish who had orchestrated a previous or an ongoing criminal enterprise. The FBI in this case worked with Kingsley to concoct an FCPA scheme and manufacture a crime. In every conversation taped in June, July, and August 2000, Kingsley attempted to create evidence of an FCPA conspiracy and tried desperately to make petitioner go along with talk of "bribes." The taped meeting held on June 2, 2000 is particularly enlightening. Petitioner expressed surprise and dismay upon learning from Kingsley that he had supposedly already paid bribes to individuals in Costa Rica. On the tape, petitioner indicated that he was aware of the federal investigation and noted that "Steven's told me all this time that there's absolutely nothing [illegal] been done. . . . " In a stressed voice, Kingsley interrupted him and attempted to trick him into stating that he was aware of the bribes. Instead, petitioner repeated that he knew nothing of past bribes (JA Ex. 2, pp. 7-8).

At that point, even if Agent Herndon had originally believed Kingsley's lies about petitioner's existing culpability, this conversation should have convinced him otherwise and caused him to blow the whistle on Kingsley's efforts. But instead of stopping Kingsley from trying to manipulate petitioner, Herndon gave a *carte blanche* to a confessed con man and instructed Kingsley to try for 2½ more months to get petitioner to incriminate himself with regard to *future* transactions. Kingsley's improper conduct is attributable to the government because he was acting as

its agent. It is this government's application of "an element of persuasion or mild coercion" that renders the behavior here fundamentally unfair and unethical. *See United States v. Andrews*, 765 F.2d 1491, 1499 (11th Cir. 1985); *see also United States v. Lard*, 734 F.2d 1290, 1296 (8th Cir. 1984) (finding that government agent's involvement approached a level of outrageousness that would bar a conviction).

The awesome power of the federal government can be easily abused. When it is, the courts have an obligation to step in. The government has no business concocting a phony crime, enlisting a known felon as its wire-wearing seducer, characterizing a proposed but non-existent transaction as illegal, and then encouraging a law-abiding third party to agree with that characterization. The government stepped way over the line here and should be reprimanded, not rewarded, for its repugnant behavior, and review should be granted to clarify the line between aggressive prosecution and unconstitutional overreaching.

CONCLUSION

For the reasons stated, the petition for certiorari should be granted. In the alternative, certiorari should be granted, the judgment below vacated, and the case remanded to the Court of Appeals for reconsideration in light of *Crawford v. Washington*, 124 S. Ct. 1354 (2004).

Respectfully submitted,

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May 2004

APPENDIX A

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 03-1112

United States of America, Appellee, v. Robert Richard King, Appellant.	* * * * * * *	Appeal from the United States District Court for the Western District of Missouri.

Submitted: September 8, 2003

Filed: December 15, 2003

Before MORRIS SHEPPARD ARNOLD, BEAM, BYE, Circuit Judges.

BEAM, Circuit Judge.

On June 27, 2001, a grand jury indicted Richard King for conspiring to violate the Foreign Corrupt Practices Act ("FCPA") and for violating the FCPA and the Interstate Travel in Aid of Racketeering Act ("Travel Act") by agreeing to bribe Costa Rican officials to obtain valuable land concessions needed to develop a Costa Rica project. A jury later convicted King of one count of conspiracy and four

counts under the FCPA. The district court[1] sentenced King to thirty months' imprisonment and fined him $60,000.

King appeals claiming: 1) the evidence was insufficient to support the convictions, 2) the trial court erred by admitting some tape recordings while denying the recordings King offered, 3) the trial court erred by instructing the jury on "deliberate ignorance," and 4) the trial court erred by denying King's motion to dismiss the indictment prior to trial due to the government's overreaching conduct. For the reasons set forth below, we affirm.

I. BACKGROUND

This case involves an FBI investigation into the dealings between certain individuals who hoped to develop a port in Limon, Costa Rica. The focus of the investigation concerned the planned payment of a $1 million bribe (a.k.a. "kiss payment" or "closing cost" or "toll") to senior Costa Rican officials and political parties to obtain concessions for the land on which the new development was to be built.

Much of the investigation centered around the dealings of Owl Securities and Investments, Ltd. ("OSI"), a company based in Kansas City, and its employees and contributors. Several individuals attempted to raise funds from investors through OSI for the multi-faceted project in Costa Rica involving a large land and port development.

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[1] The Honorable Scott O. Wright, United States District Judge for the Western District of Missouri.

The project had many components including a port, a salvage station, development of recreational facilities, housing, light manufacturing, warehouses, and an airport. During the investigation, the FBI encountered several individuals including Stephen Kingsley, President and CEO of OSI; Richard Halford, OSI's CFO; Albert Reitz, OSI's VP; Pablo Barquero, an agent of OSI in the Costa Rican office; and Defendant King, one of OSI's largest investors. FBI Special Agent Robert Herndon led the inquiry, originally investigating Kingsley and OSI. Ultimately, Agent Herndon sought the cooperation of both Kingsley and Reitz to obtain recordings of conversations between alleged conspirators, including King.

II. DISCUSSION

A. Sufficiency of the Evidence

"In reviewing the sufficiency of the evidence on appeal, the court views the evidence in the light most favorable to the government, resolving evidentiary conflicts in favor of the government, and accepting all reasonable inferences drawn from the evidence that support the jury's verdict." *United States v. Two Eagle,* 318 F.3d 785, 790 (8th Cir. 2003). We are bound by a strict standard of review when reviewing the sufficiency of the evidence, and the verdict of the jury should not be overturned lightly. *Id.* "The verdict must be upheld 'if there is substantial evidence that would allow any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt.'" *United States v. Waldman,* 310 F.3d 1074, 1077 (8th Cir. 2002) (quoting *United States v. Wright,* 246 F.3d 1123, 1126 (8th Cir. 2001)).

At trial, the government presented six witnesses. Two of those witnesses, Richard Halford and Albert Reitz, testified on behalf of the government pursuant to a plea agreement wherein each pleaded guilty to certain offenses in exchange for the possibility of a more lenient sentence. The government questioned each of the six witnesses about King's involvement with and knowledge of the planned bribe. The government also published portions of several taped conversations between King and others, which Stephen Kingsley recorded at the FBI's request. These taped conversations involving King occurred between May 26, 2000, and August 17, 2000.

To prove conspiracy, the government must show an agreement between at least two people and that the agreement's objective was a violation of the law. *United States v. Jackson,* 345 F.3d 638, 648 (8th Cir. 2003). "Proof of a formal agreement is unnecessary; a tacit understanding is sufficient, and can be proved by direct or circumstantial evidence." *Id.* (citation omitted).

For King's remaining FCPA convictions, the plain language of the FCPA prohibits the use of "any means or instrumentality of interstate commerce corruptly in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to any foreign official for purposes of influencing any act or decision of such foreign official in his official capacity." 15 U.S.C. § 78dd-1(a)(1)(A).

Viewing the evidence in the light most favorable to the verdict, there was ample evidence in the record to support the jury's convictions. The tape recordings, alone, support the jury's verdict.[2] There was sufficient evidence to prove

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[2] For example, the following exchanges are just a small sample of what the jury heard:

May 26, 2000:

Kingsley:	Well you've always known about the closing cost fees and that.
King:	I've known what?
Kingsley:	You've known about the closing costs.
King:	The one million dollars?
Kingsley:	Yeah.
King:	I've known about that for five years, yeah, . . .

June 1 and 2, 2000:

King:	You see when they walk into the bank, you know, the bank is going to be curious as to what they're putting up a million-dollars for . . .
Kingsley:	Well do they . . .
King:	. . . If they do a letter of credit.
Kingsley:	. . . do the bank . . . do . . .
King:	Ah, my own bank does not ask for that. My own bank is going to take the Falcon. But if I go with these other people, a letter of credit, and the reason I may go to them for a letter of credit instead of my own letter of credit is that it's, it's going to get them involved in this.
Kingsley:	Yeah. Do
King:	And we don't, we don't want just a million-dollars, we want a hundred thirty-five million.
Kingsley:	Yeah. Do they know what the million[']s for though?
King:	Ah, probably . . . I think I told them yeah.
Kingsley:	Yeah. Well
King:	They didn't bat an eye.

(Continued on following page)

Kingsley: (coughs)

King: I put it in this letter as a closing cost.

Kingsley: Yeah, that's what Dick likes to call it, is a closing cost.

June 28, 2000:

Kingsley: Well, look, what.

Halford: He irritated a lot of people.

Kingsley: Yeah, what, um, what Pablo had said, was why just pay, pay off the current politicians. Pay off the future ones.

King: That's right. Because we're gonna have to work with them anyway.

Kingsley: And so what he was saying was double, you know, give them more money. Buy the opposition. If you buy the current party and the opposition, then it doesn't matter who's in because there's only two parties.

King: The thing that really worries me is that, uh, if the Justice Department gets a hold of. Finds out how many people we've been paying off down there. Uh, or even if they don't. Are we gonna have to spend the rest of our lives paying off these petty politicians to keep them out of our hair? I can just see us, every, every day some politician on our doorstep down there wanting a hand out for this or that.

Kingsley: Well, I mean,

King: I'd like to

Kingsley: I

King: Think we could pay the top people enough, that the rest of the people won't bother us any. That's what I'm hoping this million and a half dollars does. I'm hoping it pays enough top people . . .

August 17, 2000.

Kingsley: Now Pablo's continued to talk to the politicians. They know about the toll, closing costs call it

(Continued on following page)

King's knowledge of the proposed payment long before Kingsley became an informant for the government. Moreover, the recordings show King's knowing participation in, approval of, and subsequent actions in furtherance of the conspiracy to offer the bribe. In addition, the testimony of

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what you will. So he's still our biggest asset in place.

King: What do they know about the closing costs?

Kingsley: Who?

King: Does everybody agree to what we talked about recently?

Kingsley: Yeah, a million into escrow for the toll.

King: And then we get the property and then we do the (unintelligible)?

Kingsley: Um hum. Yeah now let me I'll, I'll, I'll come on to that because I'll explain how we work through that. Uh, essentially once the politicians see the money in escrow, they'll move. That's what it comes down to (clears throat). Pablo's gonna send a list, an e-mail with a list of politicians already paid off and the ones he's gonna pay off.

King: Isn't that awfully dangerous?

Kingsley: No e-mail's probably the most secure form of communication.

King: From what I read it's not, number one and number two, there's got to be a better way.

Barquero: We have to make the politicians sure that they are going to get that. That is one thing that we have to make them feel comfortable that uh, we would get the full support.

King: I (unintelligible)

Barquero: What

King: I'm more concerned about

Barquero: (unintelligible)

King: Not getting caught.

six witnesses conducted over a five-day period, and the remaining exhibits support the jury's conviction of King for conspiracy and substantive violations under the FCPA.

B. Evidentiary Rulings

King also challenges the district court's admission of the FBI tapes, arguing that 1) without Kingsley or Barquero available for cross-examination[3] the admission of their statements violated King's Sixth Amendment right to confrontation, 2) the district court's admission of only portions of the tapes violated the rule of completeness, and 3) there were reasons to question the accuracy and completeness of the tapes.

We review the district court's evidentiary rulings for abuse of discretion. *Asa-Brandt, Inc. v. ADM Investor Servs., Inc.*, 344 F.3d 738, 747 (8th Cir. 2003). First, the admission of the Kingsley conversations are non-hearsay, out-of-court statements that raise no Confrontation Clause issues because they were admissible to ensure the completeness and intelligibility of King's admissions. *United States v. Stelten*, 867 F.2d 453, 454 (8th Cir. 1989). Further, even if some of Kingsley's incriminating statements were offered for the truth, King adopted those statements, thus Federal Rule of Evidence 801(d)(2)(B) deems them to be non-hearsay. *Id.* Insofar as such hearsay considerations do apply in this case, the exclusionary principles embodied in the Confrontation Clause do not nullify the well-established

[3] Kingsley was found dead on October 14, 2000, and Barquero, who was charged in this case, remains a fugitive.

reasons for making such admissions non-hearsay under the hearsay rule. *Id.*

Further, the district court did not abuse its discretion in admitting these statements under Rule 801(d)(2)(E) as statements of co-conspirators. King argues that the taped conversations between Kingsley and Barquero did not contain sufficient "indicia of reliability" to pass constitutional muster, were not corroborated by independent evidence, and did not constitute adoptive admissions by King.

Since *Bourjaily v. United States,* 483 U.S. 171, 182-83 (1987), this Circuit has rejected the indicia of reliability requirement. *United States v. Beckman,* 222 F.3d 512, 522-23 n.7 (8th Cir. 2000) (holding that *Bourjaily* rejected the proposition that admission of a co-conspirator statement required sufficient indica [*sic*] of reliability); *United States v. Roach,* 164 F.3d 403, 409 n.5 (8th Cir. 1998) ("[T]he Supreme Court has explicitly rejected the need for a separate reliability inquiry.").

> Because hearsay rules and the Confrontation Clause are generally designed to protect similar values, and stem from the same roots, . . . no independent inquiry into reliability is required when the evidence falls within a firmly rooted hearsay exception. We think that the co-conspirator exception to the hearsay rule is firmly enough rooted in our jurisprudence that . . . a court need not independently inquire into the reliability of such statements.

Bourjaily, 483 U.S. at 182-83 (internal quotations and citations omitted).

To admit statements of co-conspirators under Federal Rule of Evidence 801(d)(2)(E), the government must demonstrate by a preponderance of the evidence "'(1) that a conspiracy existed; (2) that the defendant and the declarant were members of the conspiracy; and (3) that the declaration was made during the course and in furtherance of the conspiracy.'" *Beckman*, 222 F.3d at 522 (quoting *United States v. Bell*, 573 F.2d 1040, 1043 (8th Cir. 1978)). Our review of the record demonstrates that the government met this burden in admitting the Kingsley/Barquero statements as those of co-conspirators. Furthermore, the fact that Kingsley allied himself with the government "has no effect on the continuing conspiratorial efforts of his former associates who remain at large," and does not bar admission of his statements under Rule 801(d)(2)(E). *United States v. Lewis*, 759 F.2d 1316, 1348 (8th Cir. 1985). Barquero's statements made to Kingsley are admissible under Rule 801(d)(2)(E) even though Kingsley was acting under the direction and surveillance of government agents to obtain evidence against the co-conspirators. *Id.* The district court did not abuse its discretion in admitting these statements. We find King's remaining contentions without merit.

Finally, King challenges the district court's denial under the rule of completeness. Rule 106 provides:

> When a . . . recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

Fed. R. Evid. 106. While in some cases Rule 106 may require that all or portions of a series of recorded conversations

be played to avoid misleading the jury, "the party urging admission of an excluded conversation must 'specify the portion of the testimony that is relevant to the issue at trial and that qualifies or explains portions already admitted.'" *United States v. Webber,* 255 F.3d 523, 526 (8th Cir. 2001) (quoting *United States v. Sweiss,* 814 F.2d 1208, 1212 (7th Cir. 1987)). "In addition, the district court has broad discretion to conduct the trial in an orderly and efficient manner, and to choose among reasonable evidentiary alternatives to satisfy the rule of completeness reflected in Rule 106." *Webber,* 255 F.3d at 526.

After review of the trial record, we conclude the district court did not abuse its discretion by denying King's request to publish all the tapes to the jury in their entirety. Nor do we find that the tapes that were submitted to the jury denied King a fair trial. King *did* present some additional portions of the remaining tapes or tape transcripts to the jury, thus providing context where the defense felt necessary.[4] As to the remaining portions of the tapes, King does not specify the portion of the testimony that is relevant to the issue at trial and that qualifies or explains the portions already admitted. *See id.* Nor does King show that the tapes that the government introduced at trial misled the jury or provided an incomplete or distorted view of the relationship and communications between King and Kingsley, all of which would be relevant under the Rule 106 inquiry.

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[4] Even then, King failed to timely request that these supplemental portions be played or read at the time the government first published them to the jury as required under Rule 106, an issue we will not address dispositively in this appeal.

Likewise, as to the accuracy and completeness of the tapes, although Kingsley failed to record each and every conversation, Agent Herndon testified that Kingsley would take notes of those conversations and give those notes to the FBI. Further, the fact that Kingsley recorded the tapes outside the presence of the FBI on many occasions is also of no consequence. The FBI closely monitored the development of the conversations over time, ensuring the accuracy and consistency as one conversation built upon another. Admitting portions of the tapes in light of this evidence was not an abuse of discretion.

C. Deliberate Ignorance Instruction

King also challenges the deliberate ignorance instruction given to the jury. We review the district court's decision to give a jury instruction under the abuse of discretion standard. *United States v. Woodard,* 315 F.3d 1000, 1003 (8th Cir. 2003). A deliberate ignorance instruction essentially "'allows the jury to impute knowledge to [the defendant] of what should be obvious to him, if it [finds], beyond a reasonable doubt, a conscious purpose to avoid enlightenment.'" *United States v. Barnhart,* 979 F.2d 647, 651 (8th Cir. 1992) (first alteration in original) (quoting *United States v. Zimmerman,* 832 F.2d 454, 458 (8th Cir. 1987) (per curiam)). We are cognizant of the risk, however, that a deliberate ignorance instruction might lead the jury to employ a negligence standard and convict a defendant on the impermissible ground that he should have known an illegal act was taking place. *Barnhart,* 979 F.2d at 651. Thus,

> [o]ur review of the District Court's decision to give this particular instruction must be done by viewing the evidence and any reasonable inference

> from that evidence in the light most favorable to the government. While a district court should not give the deliberate-ignorance instruction when the evidence points *solely* to the defendant's actual knowledge of the facts in question, the "instruction is particularly appropriate when the defendant denies any knowledge of a criminal scheme despite strong evidence to the contrary."

Woodard, 315 F.3d at 1003-04 (quoting *United States v. Regan*, 940 F.2d 1134, 1136 (8th Cir. 1991)) (internal citations omitted). "In order for a defendant's ignorance to be deliberate or willful, the defendant must have been presented with facts that put him on notice that criminal activity is probably afoot, and then the defendant must have failed to investigate those facts . . . ." *Barnhart*, 979 F.2d at 652.

The district court did not abuse its discretion by giving the deliberate ignorance instruction. The only "error" we find, if any, is that the deliberate ignorance instruction was superfluous in this case, which is certainly not reversible error. Given the evidence presented by the government against King, this instruction was irrelevant at worst. Although the evidence certainly suggested that King was not *ignorant* of the criminal scheme, but rather he, in fact, *knew* of the scheme and worked to perpetuate the bribe, King's defense was to attack the credibility of his co-conspirators and point to the lack of proof of his bad intent, arguing that he did not "corruptly" do anything. Given this defense strategy, in light of the evidence presented by the government against King, the instruction was appropriate. *See id.*, at 651.

D. Motion to Dismiss

King's final argument is that the district court erred in refusing to dismiss the indictment due to the government's alleged outrageous misconduct. King claims that the government allowed its informant Kingsley to target King for prosecution and essentially manufactured the crimes for which King was convicted. The district court, through its adoption of the magistrate judge's[5] report and recommendation, denied King's motion to dismiss.

The court reviews de novo a district court's order denying a motion to dismiss an indictment. *Two Eagle,* 318 F.3d at 793. While there may be circumstances in which the conduct of law enforcement agents is so outrageous that due process bars the government from invoking the judicial process to obtain a conviction, *United States v. Russell,* 411 U.S. 423, 431-32 (1973), "[t]he level of outrageousness needed to prove a due process violation is quite high, and the government's conduct must shock the conscience of the court." *United States v. Pardue,* 983 F.2d 843, 847 (8th Cir. 1993) (internal quotations omitted). This defense is reserved for conduct that falls "within that narrow band of 'the most intolerable government conduct.'" *Pardue,* 983 F.2d at 847 (quoting *United States v. Musslyn,* 865 F.2d 945, 947 (8th Cir. 1989)).

After our thorough review of the evidence presented at the hearing on the motion to dismiss, we too follow the well-reasoned analysis of the magistrate judge. We find no

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[5] The Honorable John T. Maughmer, Chief United States Magistrate Judge, United States District Court for the Western District of Missouri.

evidence of conscience-shocking behavior on the part of the government. That the evidence was "contrived" or that trickery was involved is simply not supported by the evidence. We do not dispute that it was quite likely that Kingsley's character was flawed, but we recognize, like the magistrate judge did, that the use of unsavory informants is quite often the nature of the beast in police investigations. Such realities do not rise to the level of outrageousness needed to support a due process violation. Accordingly, we affirm the district court's dismissal of King's motion to dismiss.

III. CONCLUSION

For the reasons set forth herein, we affirm the judgment of the district court.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 03-1112

United States of America,	*	
	*	Order Denying Petition
Appellee,	*	for Rehearing and for
	*	Rehearing En Banc
v.	*	
	*	
Robert Richard King,	*	
	*	
Appellant.	*	

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

(5128-010199)

February 19, 2004

Order Entered at the Direction of the Court:

/s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit